

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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|---------------------------|---|-----------------------|
| IN RE: |) | |
| |) | |
| KROPP EQUIPMENT, INC., |) | CASE NO. 09-25196 JPK |
| |) | Chapter 11 |
| Debtor. |) | |
| ***** |) | |
| KROPP EQUIPMENT, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | ADVERSARY NO. 10-2035 |
| |) | |
| RICHARD DWYER, JAMES |) | |
| BREWER, DAVID GARELLI and |) | |
| ILLINI HI-REACH, INC., |) | |
| |) | |
| Defendants. |) | |

MEMORANDUM CONSTITUTING FINDINGS OF
FACT AND CONCLUSIONS OF LAW PURSUANT TO
28 U.S.C. § 157(c)(1)/N.D.Ind.L.R. 200.1(a)(3)(B)

The matter before the court arises from the Adversary Defendants' Motion to Dismiss filed by the four defendants, Richard Dwyer, James Brewer, David Garelli and Illini Hi-Reach, Inc. (respectively, "Dwyer", "Brewer", "Garelli", and "Illini") on March 17, 2010.¹ This adversary proceeding was initiated by a complaint filed on March 9, 2010 by Kropp Equipment, Inc. ("Kropp"), the debtor-in-possession in a voluntary Chapter 11 reorganization case pending before the court as case number 09-25196. On March 9, 2010, Kropp also filed its Amended Emergency Motion for TRO With Notice and Preliminary Injunction. By order entered on March 15, 2010, the court scheduled a hearing on that motion; the hearing was held on March 23, 2010. At that hearing, the court addressed with the parties its concerns about the nature of its jurisdiction with respect to the complaint and the motion, and its concerns as to matters relating

¹ On March 17, 2010, the four defendants also filed their Adversary Defendants' Motion to Abstain. This Memorandum of Decision relates solely to the motion to dismiss; a separate proposed order will be issued with respect to the abstention motion.

to appropriate venue for the complaint in the United States Bankruptcy Court for the Northern District of Indiana. The pertinent portion of the order which resulted from that hearing, as it relates to the matters addressed by this Memorandum of Decision, is the following:

By order entered on March 15, 2010, the court scheduled a hearing on the Motion. That hearing was held on March 23, 2010. The plaintiff appeared by counsel Daniel L. Freeland, Sheila A. Ramacci and Marcos Reilly; the defendants Richard Dwyer, James Brewer and David Garelli appeared by counsel James E. O'Halloran and James L. Wieser; defendant Illini Hi-Reach, Inc. appeared by counsel James L. Wieser.

Upon commencement of the hearing, the court discussed with the parties the court's analysis of matters involved in determination of the Motion, including matters arising from the Adversary Defendants' Motion to Dismiss filed on March 17, 2010 and the Adversary Defendants' Motion to Abstain, also filed on March 17, 2010. The court provided the parties with an outline of the manner in which the court deemed issues before it to be interrelated, and the court's conceptual framework of issues involved in resolution of those matters. There are three general substantive issue areas, several of which have substantive sub-issues. The parties agreed that all of these issues may be presented to the court on the record presently before the court, and that no additional factual record is necessary for the court's determination of these issues. The issues are the following:

A. Determination of the nature of the court's jurisdiction with respect to matters raised by the complaint filed in this adversary proceeding, and the Motion. All parties agree that all matters presently before the court with respect to the complaint and the Motion are within the court's "related to" jurisdiction, pursuant to 28 U.S.C. § 1334(a) and (b)/28 U.S.C. § 157(a)/N.D.Ind.L.R. 200.1. The plaintiff contends that the matters before the court constitute "core proceedings" pursuant to 28 U.S.C. § 157(b)(2), which would provide the court with final judicial authority; the defendants contend that none of the matters before the court constitute "core proceedings", and the defendants do not consent to the court's exercise of final adjudicatory authority pursuant to 28 U.S.C. § 157(c)(2). Thus, the first issue before the court is whether or not the matters raised by the adversary complaint and by the Motion constitute "core proceedings" pursuant to 28 U.S.C. § 157(b)(2).

B. As stated in their motion to dismiss filed on March 17, 2010, the defendants contend that venue is not properly lodged in the United States Bankruptcy Court for the Northern District of

Indiana with respect to matters raised by the adversary complaint. Plaintiff contends that venue is properly before this court. Matters to be addressed by the parties with respect to this issue are the following:

1. Whether venue is initially determined to be proper under 28 U.S.C. § 1409(a), or whether venue is to be determined pursuant to 28 U.S.C. § 1409(d).

2. If venue is to be determined pursuant to 28 U.S.C. § 1409(d), the appropriate venue provided for by 28 U.S.C. § 1391(a).

3. If, after consideration of the foregoing, venue is determined to be proper in other than the United States Bankruptcy Court for the Northern District of Indiana, whether the case should be dismissed, or whether the case should be transferred to any district in which it could have been brought, pursuant to 28 U.S.C. § 1406(a).

C. With respect to the defendants' motion to abstain, whether or not the court should abstain pursuant to 28 U.S.C. § 1334(c)(1) and the law applicable to abstention under that provision.

As noted in the foregoing, the defendants did not consent to the court's exercise of final judgment jurisdiction in the manner required by 28 U.S.C. § 157(c)(2)/N.D.Ind.L.R.

200.1(a)(3)(A). However, all parties agreed that this adversary proceeding constitutes a matter related to a case under title 11. The court has jurisdiction to enter this Memorandum of Decision pursuant to 28 U.S.C. § 1334(a) and (b); 28 U.S.C. § 157(a) and N.D.Ind.L.R. 200.1(a) and (3); and 28 U.S.C. § 157(b)(3) and (c)(1). The procedures specified in N.D.Ind.L.R. 200.1(a)(3)(B) shall apply with respect to further proceedings in relation to the findings of fact and conclusions of law as stated in this Memorandum of Decision.²

I. ISSUES AND RECORD BEFORE THE COURT

The issues before the court with respect to this Memorandum of Decision are those

² Pursuant to N.D.Ind.L.R. 200.1(a)(3)(B) the court has filed its proposed findings of fact and conclusions of law (this Memorandum of Decision), a proposed order, and a recommendation concerning whether the review of the proceedings should be expedited.

stated in sub-paragraphs A and B of the court's order entered on March 26, 2010 (record entry #28), *supra*.

As stated in that order, these matters were agreed by the parties to be determinable upon the record before the court in adversary proceeding number 10-2035. The principal record necessary for determination of the defendants' motion to dismiss is stated in Kropp's Verified Adversary Complaint. That record, as supplemented, establishes the following pertinent facts:

1. Before Kropp's filing of bankruptcy, Kropp entered into contracts with Dwyer, Brewer and Garelli which included non-competition covenants with respect to customers of Kropp.
2. Kropp alleged that Dwyer, Brewer and Garelli obtained employment with the defendant Illini, and in their positions as employees of Illini "competed with Kropp for the business of several of Kropp's current clients", in the process utilizing, or in the future potentially utilizing, "Kropp's confidential information and trade secrets in violation of [the agreement between Kropp and each of the individual defendants]".
3. Kropp alleged that Illini "has tortiously interfered with Kropp's [agreements with Dwyer, Brewer and Garelli] by wrongfully inducing [those individuals] to breach them".
4. Kropp is an Indiana corporation, with its principal place of business in Schererville, Indiana.
5. The defendants Dwyer, Brewer and Garelli reside in Illinois.
6. The defendant Illini is an Illinois corporation, with its principal place of business in Lemont, Illinois.
7. The acts complained of with respect to the defendants "all took place in Illinois".
8. The actions of which Kropp complains with respect to the defendants all occurred subsequent to Kropp's initiation of its Chapter 11 bankruptcy case.

9. The pertinent provisions of Kropp's employment contracts with Dwyer, Brewer and Garelli, for the purposes of this Memorandum, are paragraphs 1, 2 and 6 of each agreement, which are respectively the following as to paragraph 1:

a. Agreement Not to Compete. While I am employed by the Company, and for ONE year afterward, I will not compete with the business of the Company or it's successors and assigns, within a radius of 75 miles from the intersection of route 12 and route 173 Richmond, Illinois. I will not directly or indirectly, as an owner, officer, director, employee, independent contractor, consultant, representative, or in any other capacity, engage in activities competitive to the Company in the business of Renting, Leasing, Selling Aerial Equipment to include Fork Trucks and Material handlers or in a business substantially similar to the present business of the Company, or other business activity in which the Company may substantially engage while I'm employed by the Company; [Dwyer].

b. Agreement Not to Compete. While I am employed by the Company, and for ONE year afterward, I will not compete with the business of the Company or it's successors and assigns, within a radius of 75 miles from 16050 Woodmint lane, South Beloit, Illinois 61080 location of the Company. I will not directly or indirectly, as an owner, officer, director, employee, independent contractor, consultant, representative, or in any other capacity, engage in activities competitive to the Company in the business of Renting, Leasing, Selling Aerial Equipment to include Fork Trucks and Material handlers or in a business substantially similar to the present business of the Company, or other business activity in which the Company may substantially engage while I'm employed by the Company; [Brewer].

c. Agreement Not to Compete. While I am employed by the Company, and for one year afterward, I will not compete with the business of the Company or it's successors and assigns, within a radius of 50 miles from the present location of the Company. I will not directly or indirectly, as an owner, officer, director, employee, independent contractor,

consultant, representative, or in any other capacity, engage in activities competitive to the Company in the business of renting, selling and/or leasing of Aerial Work Platforms, Telehandlers, and Carry Deck Cranes, or in a business substantially similar to the present business of the Company, or other business activity in which the Company may substantially engage while I'm employed by the Company; [Garelli].

d. The balance of paragraph 1 of each of the three foregoing contracts, and paragraphs 2 and 6 of each contract, are identical, stating the following:

In particular, I will not:

(a) solicit or attempt to solicit any business or trade from the Company's actual or prospective customers or clients on behalf of myself or any other person, firm, partnership, corporation or other entity competitive to the Company;

(b) solicit or attempt to solicit any existing Company employee for the purpose of said employee leaving the Company's employment and working for any customer or competitor; or

(c) induce or encourage any independent contractor or consultant performing services for the Company to sever his or her relationship with the Company.

I acknowledge that the Company may notify my future or prospective employers or any third party of the existence of this agreement.

2. Confidentiality. I acknowledge that the Company, in reliance of this agreement, may provide me with access to trade secrets, customers, proprietary data and other confidential information. I agree to retain said information as confidential and not to use said information on my own behalf or disclose same to any third party, except when I am required to do so to properly perform my duties to the Company.

6. Governing Law. The formation, construction and interpretation of this agreement shall at all times and in all respects be governed by the laws of the State of ILLINOIS.

10. The court takes judicial notice of the following pursuant to Fed.R.Evid. 201(b)(2), derived from a map of the State of Illinois produced by the Chicago Motor Club (AAA) and the

mileage gauge therein provided:

(a) A radius of 75 miles from South Beloit, Illinois reaches into no part of the State of Indiana; [Brewer's geographic covenant area].

(b) A radius of 50 miles from South Beloit, Illinois reaches into no part of the State of Indiana; [Garelli's geographic covenant area].³

(c) A radius of 75 miles from Richmond, Illinois will barely reach into northern Lake County, Indiana; will not reach south of U.S. 30 in Lake County, Indiana; and will reach U.S. 41 in Lake County, Indiana only, if at all, for several miles east of U.S. 41 beginning at a point north of U.S. 30; [Dwyer's geographic covenant area].

Thus, for the purposes of this Memorandum of Decision, the employment contracts were entered into with the defendants Dwyer, Brewer and Garelli prior to the filing of Kropp's Chapter 11 case, and any breach of restrictive covenants stated in those employment contracts occurred after the filing of Kropp's Chapter 11 case. Kropp is a resident/citizen of the State of Indiana; all of the four defendants are residents/citizens of the State of Illinois.

II LEGAL ANALYSIS

A. Core/Non-Core Proceeding

This issue was designated in sub-paragraph A, *supra.*, of the court's March 26, 2010 order (record entry #28). Kropp contends that the matters before the court are "core" proceedings pursuant to 28 U.S.C. § 157(b)(2), an assertion with which the defendants disagree.

28 U.S.C. § 157(b)(1) and (2) state:

(b)(1) Bankruptcy judges may hear and determine all cases under

³ Garelli's restricted area is stated as "within a radius of 50 miles from the present location of the Company". Paragraph 17 of Kropp's complaint states that Garelli was first employed at the "South Beloit, IL branch office"; the court construes the geographic restriction to be measured from that location.

title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful

death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

The United States Court of Appeals for the Seventh Circuit is a Circuit which narrowly construes the jurisdiction of a federal bankruptcy court, perhaps more narrowly than does any other circuit. As is true with the Seventh Circuit's narrow interpretation of the scope of the bankruptcy court's "related to" jurisdiction, the Seventh Circuit construes the concept of a "core proceeding" narrowly, as well. We start with the following statement in *Barnett v. Stern*, 909 F.2d 973, 981-982 (7th Cir. 1990):

Relatively few circuit cases (and none from this circuit) provide general guidance for determining when a matter that does not readily fit within the enumerated statutory categories is a core proceeding. A leading case among those few that have offered such general guidance is *In re Wood*, 825 F.2d 90 (5th Cir.1987). The *Wood* court adopted the following test for determining whether a matter was a core proceeding:

[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.

Id. at 97. The court also contrasted "core" and "related" proceedings:

If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an "otherwise related" or non-core proceeding.

Id. (emphasis in original); see also *In re Davis*, 899 F.2d 1136, 1140-41 (11th Cir.1990) (adopting the *Wood* court's test for core proceedings); *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156 n. 9 (3d Cir.1989) (citing with approval the *Wood* formulation). But see *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398-1400 (2d Cir.1990) (generally espousing a broad interpretation of core proceedings and declining to follow *Wood* to the extent of any conflict), *cert. granted*, --- U.S. ---, 110

S.Ct. 3269, 111 L.Ed.2d 779 (1990); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir.1989) (reasoning that proceedings that have the effect of bringing property into the estate of the debtor are core proceedings); *In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir.1987) (espousing broad interpretation of core proceedings). We believe that the approach of *Wood* and its progeny reflects most precisely the constitutional policy concerns expressed by the Supreme Court in *Marathon* and by Congress in the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Under the *Wood* test, Levit's RICO claim against Todd in his individual capacity is not a core proceeding. First, the claim does not invoke a substantive right created by federal bankruptcy law. Instead, it invokes rights created under the federal RICO statute. Second, this is a claim that could exist outside of the bankruptcy context. Although Levit's claim is for damages resulting from the post-petition diversion of trust funds, the same claim for the same damages over the same time period could have been prosecuted in federal district court. Thus, we conclude that, because Levit's RICO claim against Todd would not have been a core proceeding in bankruptcy, Levit was not required to assert his RICO claim in the adversary proceeding. Therefore, we reverse the judgment of the district court for Todd on Count V. (footnote omitted)

As is made clear by the foregoing statement, the Seventh Circuit has adopted the construction of "core proceeding" stated in *In re Wood*, 825 F.2d 90 (5th Cir. 1987). The parameters of core proceedings were addressed in that case as follows:

We have decided that subject-matter jurisdiction exists over this proceeding. We must now determine the placement of that jurisdiction. Our analysis turns to 28 U.S.C. § 157, the response of Congress to *Marathon* and its replacement for subsection 1471(c) of the 1978 Act. In contrast to subsection 1471(c), section 157 does not give bankruptcy courts full judicial power over all matters over which the district courts have jurisdiction under section 1334. With respect to proceedings other than the bankruptcy petition itself, section 157 divides all proceedings into two categories. Subsection 157(b)(1) gives bankruptcy judges the power to determine "all core proceedings arising under title 11, or arising in a case under title 11" and to enter appropriate orders and judgments. Subsection 157(c)(2) gives the bankruptcy judge the limited power to hear "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11" and to submit proposed findings of fact and conclusions of law to the district court, subject to de novo review. The essential distinction that must be made, therefore, is whether this action is a

core or non-core proceeding.

The statute does not define core proceedings. Subsection (b)(2) does provide a nonexclusive list of examples, three of which are arguably relevant here:

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate

...;

....; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship....

We note that the last example is broadly worded; indeed, “proceedings affecting ... the estate” is similar in scope to the test of jurisdiction: proceedings having a “conceivable effect on the estate”. We decline, however, to give such a broad reading to subsection 157(b)(2)(O); otherwise, the entire range of proceedings under bankruptcy jurisdiction would fall within the scope of core proceedings, a result contrary to the ostensible purpose of the 1984 Act. That purpose is to conform the bankruptcy statute to the dictates of *Marathon*.^{FN25}

FN25. Numerous courts have noted the necessity of defining core proceedings narrowly so as to conform to the constitutional proscription of *Marathon*. *E.g.*, *Piombo Corp. v. Castlerock Properties*, 781 F.2d 159, 162 (9th Cir.1986); *In re Satelco, Inc.*, 58 B.R. 781, 788 (Bankr.N.D.Tex. 1986); *In re American Energy, Inc.*, 50 B.R. 175, 178 (Bankr.D.N.D.1985).

Specifically, *Marathon*, involved an adversarial proceeding brought by the debtor-in-bankruptcy on a pre-petition claim arising under state substantive law against a defendant who had not filed a claim in bankruptcy. A plurality of the Supreme Court held that the proceeding could not be adjudicated by the bankruptcy court. The exact extent of *Marathon* 's holding is subject to debate. Certain principles can be extracted from its opinions, principles that apparently have been incorporated into the 1984 Act.

Justice Brennan, writing for the plurality, held that only controversies involving “public rights”, rights provided to an individual by Congress under one of its exceptional powers under the Constitution, may be removed from Article III courts and delegated to non-Article III tribunals.^{FN26} Justice Brennan implicitly

recognized that the exceptional powers of Congress under the bankruptcy clause may sometimes allow for such delegations of judicial power:

FN26. 458 U.S. at 69-70, 102 S.Ct. at 2870-71, 73 L.Ed.2d at 614.

But the restructuring of debtor-creditor relations, which is at the *core* of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a “public right,” but the latter obviously is not.^{FN27}

FN27. *Id.* at 71, 102 S.Ct. at 2871, 73 L.Ed.2d at 615 (emphasis added).

Concerning the latter controversy, he noted:

This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization. But this relationship does not transform the state-created right into a matter between the Government and the petitioner for reorganization. Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.^{FN28}

FN28. *Id.* at 72 n. 26, 102 S.Ct. at 2872 n. 26, 73 L.Ed.2d at 615 n. 26.

Two points are suggested by this language. First, bankruptcy judges may exercise full judicial power over only those controversies that implicate the peculiar rights and powers of bankruptcy or, in Justice Brennan's words, controversies “at the core of the federal bankruptcy power”. Second, controversies that do not depend on the bankruptcy laws for their existence—suits that could proceed in another court even in the absence of bankruptcy—are not core proceedings. These points are echoed by Chief Justice Burger in his dissent in which he characterized the plurality opinion as follows:

the Court's holding is limited to the proposition ... that a “traditonal” state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an “Article III court”.^{FN29}

FN29. *Id.* at 92, 102 S.Ct. at 2882, 73 L.Ed.2d at 628 (Burger, C.J., dissenting).

Justice White expressed concern, however, that the plurality's holding placed too much emphasis on the existence of state law issues in the proceeding before bankruptcy court:

Second, the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings.... The crucial point to be made is that in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy-claims for goods sold, wages, rent, utilities, and the like.... Every such claim must be filed and its validity is subject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depend on state law. Hence, the bankruptcy judge is constantly enmeshed in state-law issues.^{FN30}

FN30. *Id.* at 96-97, 102 S.Ct. at 2884-85, 73 L.Ed.2d at 631 (White, J., dissenting).

Section 157 of the 1984 Act incorporates the principles suggested in the language of the *Marathon* opinions. The reference in the Act to “core” proceedings is taken directly from Justice Brennan's description of matters that involve the peculiar powers of bankruptcy courts. The Act describes non-core proceedings as “otherwise related”, an apparent reference to Chief Justice Burger's description of the *Marathon* proceeding as “related only peripherally to an adjudication of bankruptcy”. Mindful of the limitations of the plurality's holding and of Justice White's observations concerning state law, Congress added: “A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.”^{FN31}

FN31. 28 U.S.C. § 157(b)(3).

The meaning of core proceedings is illuminated also by the textual context in which it appears. Subsection 157(b)(1) vests full judicial power in bankruptcy courts over “core proceedings *arising under title 11, or arising in a case under title 11.*” The prepositional qualifications of core proceedings are taken from two of the three categories of jurisdiction set forth in section 1334(b): proceedings “arising under” title 11, “arising in” title 11 cases, and “related to” title 11 cases. Although the purpose of this language in section 1334(b) is to define conjunctively the scope of jurisdiction, each category has a distinguishable meaning. These meanings become relevant because section 157 apparently equates core proceedings with the categories of “arising under” and “arising in” proceedings.

Congress used the phrase “arising under title 11” to describe

those proceedings that involve a cause of action created or determined by a statutory provision of title 11.^{FN32} Apparently, the phrase was taken from 28 U.S.C. § 1331, conferring federal question jurisdiction in which it carries a similar and well-accepted meaning. The meaning of “arising in” proceedings is less clear, but seems to be a reference to those “administrative” matters that arise *only* in bankruptcy cases.^{FN33} In other words, “arising in” proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.

FN32. See 1 Collier on Bankruptcy ¶ 3.01 at 3-23 (1987).

FN33. *Id.* at 3-27.

As defined above, the phrases “arising under” and “arising in” are helpful indicators of the meaning of core proceedings. If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding; for example, an action by the trustee to avoid a preference. If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt. If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an “otherwise related” or non-core proceeding.

Finally, the interpretation of core proceeding based on its equation with “arising under” and “arising in” proceedings comports with the interpretation suggested by *Marathon*. Justice Brennan's description of “core” matters parallels that of matters “arising under” title 11-matters invoking a substantive right created by federal bankruptcy law. Moreover, his comment that the matter could have proceeded absent the bankruptcy suggests a contrast with “arising in” proceedings-matters that could arise only in bankruptcy.

We hold, therefore, that a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. The proceeding before us does not meet this test and, accordingly, is a non-core proceeding. The plaintiff's suit is not based on any right created by the federal bankruptcy law. It is based on state created rights.^{FN34} Moreover, this suit is not a proceeding that could arise only in the context of a bankruptcy. It is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court.

FN34. We are mindful that, alone, this circumstance should not be dispositive. 28 U.S.C. § 157(b)(3).

The plaintiff argues that his action is literally a claim against the estate, which is expressly defined as a core proceeding by section 157(b)(2)(B).^{FN35} We disagree. In determining the nature of a proceeding for purposes of determining core status, the court must look to both the form and the substance of the proceeding.^{FN36} The form of this action is not that of a “claim” as that term is used in bankruptcy law. A claim against the estate is instituted by filing a proof of claim as provided by the bankruptcy rules.^{FN37} The filing of the proof invokes the special rules of bankruptcy concerning objections to the claim, estimation of the claim for allowance purposes, and the rights of the claimant to vote on the proposed distribution.^{FN38} Understood in this sense, a claim filed against the estate is a core proceeding because it could arise only in the context of bankruptcy. Of course, the state-law right underlying the claim could be enforced in a state court proceeding absent the bankruptcy, but the nature of the state proceeding would be different from the nature of the proceeding following the filing of a proof of claim. Here, the plaintiff has not filed a proof of claim and has not invoked the peculiar powers of the bankruptcy court.

FN35. “Core proceedings include ... (B) allowance or disallowance of claims against the estate...” 28 U.S.C. § 157(b)(2)(B).

FN36. See *In re World Financial Services Center, Inc.*, 64 B.R. 980, 984-87 (Bankr.S.D.Cal.1986); *In re Satelco, Inc.*, 58 B.R. 781, 786-89 (Bankr.N.D.Tex.1986).

FN37. See Bankr.Rules 3001-3002.

FN38. See *In re Criswell*, 44 B.R. 95 (Bankr.E.D.Va.1984); *Distinguishing Core from Non-Core Proceedings*, Norton Bankr.L.Adviser, No. 1, Jan. 1985, p. 2.

The substance of this action does not support a finding of core status. The essential issue in the proceeding is whether the defendants are liable to the plaintiff under state law. The suit does not raise as primary issues such matters as dischargeability, allowance of the claim, or other bankruptcy matters.^{FN39} Conceivably, a final judgment in this proceeding in the plaintiff's favor may lead to proceedings to allow the claim or to discharge the debt. At this juncture, however, these concerns are speculative and insubstantial issues in the proceeding. The plaintiff's suit is not a core proceeding.

FN39. *Cf. Matter of Colorado Energy Supply*, 728 F.2d 1283, 1285-86 (10th Cir.1984) in which the court held that a claim for rents under state law was not a “traditional state claim” within the meaning of *Marathon* because the plaintiff sought also preferred status under the bankruptcy laws.

In *In re United States Brass Corporation*, 110 F.3d 1261, 1268-1269 (7th Cir. 1997), the definitive test for core/non-core determination was stated as follows:

We add for completeness, because there is a shade of doubt about whether what we called Eljer's mirror-image diversity suit is actually within the diversity jurisdiction, that section 1334(c)(2) makes abstention in favor of the state court *mandatory* in noncore proceedings not otherwise within federal jurisdiction and that these insurance cases are noncore. **Core proceedings are actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law.** See 28 U.S.C. § 157(b)(2); *Barnett v. Stern*, 909 F.2d 973, 981 (7th Cir.1990); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1234-35 (3d Cir.1994). An action to set aside a preference would be an example. 28 U.S.C. § 157(b)(2)(F); *In re Parker North American Corp.*, 24 F.3d 1145, 1149 (9th Cir.1994). The right to complain about a preference is created by the Bankruptcy Code itself, whereas Eljer's claimed right to insurance coverage is a creation of state contract law and one that could be vindicated in an ordinary breach of contract suit if Eljer were not a bankrupt. The fact that it is an *important* right to the bankrupt-Eljer claims to be seeking \$500 million in insurance coverage-is irrelevant. *In re Orion Pictures Corp.*, 4 F.3d 1095, 1102 (2d Cir.1993). “Core” is a defined term in the Bankruptcy Code, a term of art, rather than a metaphor. The impact of a claim on the size of the debtor's estate is a criterion of whether a claim is related to the bankruptcy and is therefore a noncore proceeding. *Celotex Corp. v. Edwards*, 514 U.S. 300, --- n. 6, 115 S.Ct. 1493, 1499 n. 6, 131 L.Ed.2d 403 (1995); *Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1239 (7th Cir.1990); *Home Ins. Co. v. Cooper & Cooper, Ltd., supra*, 889 F.2d at 749; *In re Reeves*, 65 F.3d 670, 675 (8th Cir.1995). So Eljer has it backwards-arguing for classification as a core proceeding on the basis of a criterion for classification as a noncore proceeding. (emphasis supplied)

The standard adopted by the Seventh Circuit is absolutely clear, and it is therefore

unnecessary for the court to address the multiple decisions of courts of other jurisdictions with regard to this issue cited by both parties in their legal memoranda. Suffice it to say that some jurisdictions apart from the Seventh Circuit construe 28 U.S.C. § 157(b)(2)(A) and (O) very broadly; however, the United States Court of Appeals for the Seventh Circuit does not. In the language of *United States Brass Corporation, supra.*, Kropp's actions advanced in this adversary proceeding are breach of contract actions in relation to Brewer, Dwyer and Garelli, and a tort action in relation to Illini: the Bankruptcy Code is not itself the source of Kropp's right or remedy. Kropp's rights or remedies arise under law other than that provided by the United States Bankruptcy Code, and in fact largely depend upon state law applicable to the interpretation of restrictive employment covenants such as those at issue in this case, and their enforcement.⁴ When viewed properly, the supposed "catchall" provisions of 28 U.S.C. § 157(b)(2)(A) and (O) are not "catchall" provisions at all. Rather, they define very definite proceedings in the context of a bankruptcy case. Matters that concern "the administration of the estate" are those which arise under the administrative procedures provisions of the Bankruptcy Code, which are those predominantly stated in Chapter 3 of the Code, appropriately enough entitled "Case Administration". Matters which relate to "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship" are as specifically stated. This is not a "liquidation" case, and given the Seventh Circuit's narrow view of bankruptcy court jurisdiction, "liquidation" of assets is pretty much literally confined to administration of a Chapter 7 estate by a Chapter 7 trustee or to liquidation under a plan of liquidation by a Chapter 11 debtor [11 U.S.C. § 363 proceedings to sell property – potentially a form of "liquidation" – having been specifically provided for by 28 U.S.C. § 157(b)(2)(N)]. None of the defendants is in any context a creditor of Kropp, and

⁴ In this case, law conceded by both the plaintiff and all four defendants to be that of the State of Illinois.

determination of the adversary proceeding will have no impact whatsoever on claims of the defendants against the estate, or on distribution among Kropp's creditors in relation to claims asserted by creditors. It is this context to which 28 U.S.C. § 157(b)(2)(O) refers. Kropp has asserted a breach of contract action against the three individual defendants and a tortious interference claim against Illini. These are contract and tort actions which arise entirely exclusive of any right or remedy provided by the Bankruptcy Code, and under the Seventh Circuit's standards, these are classic examples of non-core proceedings.

The court determines that the actions advanced by the complaint are non-core proceedings.

B. Venue of the Adversary Proceeding

As stated in the March 26, 2010 order, determination of appropriate venue has two steps. The first is to determine whether or not the provisions of 28 U.S.C. § 1409(d) apply, an issue upon which Kropp opines that 28 U.S.C. § 1409(a) provides for proper venue and that § 1409(d) does not apply, and upon which the defendants assert § 1409(a) does not provide appropriate venue because of the applicability of § 1409(d). The second issue is if 28 U.S.C. § 1409(d) applies, what is the appropriate venue under 28 U.S.C. § 1391(a).

The parties have argued briefly in their briefs the issue of burden of proof regarding proper venue for an adversary proceeding. In the context of this case, whether the plaintiff or the defendants has/have the burden of proof of establishing venue is largely immaterial, in light of the essentially clear stipulated record provided for the determination of venue. Nevertheless, it may be true that the party opposing the venue of a case under Title 11 has the burden of proving that the debtor's choice of venue is inappropriate, that concept does not carry over to venue of an adversary proceeding filed in a bankruptcy case. There is no controlling precedent in the Seventh Circuit with respect to the burden of establishing proper venue in an adversary proceeding. The court adopts the view that when venue is challenged, it is the plaintiff's burden

to establish proper venue in response to a challenge pursuant to Fed.R.Bankr.P.

7012(b)/Fed.R.Civ.P. 12(b)(3); *Electroplated Metal Solutions, Inc. v. American Services, Inc.*, 500 F. Supp.2d 974, 976 (N.D. Ill. 2007). The court views this rule to be in consonance with the Federal Rules of Bankruptcy Procedure/Federal Rules of Civil Procedure in relation to establishing the propriety of a court's authority to decide adversary proceedings/ civil litigation. When a plaintiff files a lawsuit with a court, it is the plaintiff who must establish to the court that its jurisdiction is proper, with respect to both subject matter jurisdiction and *in personam* jurisdiction over a defendant, and the court sees no reason to depart from this principle with respect to the plaintiff's having to establish that the court may properly exercise jurisdiction in relation to venue provisions.

28 U.S.C. § 1409(a) states:

Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

28 U.S.C. § 1409(d) states:

A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

Thus, 28 U.S.C. § 1409(d) provides an exception to the general principle that a proceeding relating to a case under Title 11 may be commenced in the district in which the Title 11 case is pending.

The critical question under § 1409(d) is circumscribed by the phrase "based on a claim arising after the commencement of such case from the operation of the business of the debtor". There is no controlling law of the United States Supreme Court, the United States Court of

Appeals for the Seventh Circuit, or the United States District Court for the Northern District of Indiana with respect to this issue in relation to this adversary proceeding. However, the strict interpretation of jurisdiction adopted by the Seventh Circuit in multiple contexts in bankruptcy cases argues conclusively in favor of a venue-restrictive construction of the phrase “based on a claim arising after the commencement of such case from the operation of the business of the debtor”. Kropp has cited cases which admittedly support its contention that this adversary proceeding, based upon a post-petition breach of a pre-petition contract, is outside the scope of § 1409(d). However, the cases upon which Kropp relies clearly evidence a liberal interpretation of 28 U.S.C. § 157(b) of which the United States Court of Appeals for the Seventh Circuit does not approve, particularly in the context of 28 U.S.C. § 157(b)(2)(A) and (O). Kropp cites cases which approve the concept that a post-petition breach of a pre-petition contract is a matter of administration of a bankruptcy case, and that “administrative” matters in a bankruptcy case are outside the scope of 28 U.S.C. § 1409(d). Based upon the clear directions of the Seventh Circuit, this line of authority will not stand as being applicable to this case. The contracts upon which Kropp relies were all executed prior to its filing of bankruptcy, and if the defendants had not allegedly engaged in conduct of which Kropp complains, no claim would have ever arisen. The focus of § 1409(d) is “a claim arising after the commencement” of the debtor’s bankruptcy case, and as would be true for the application of a statute of limitations applicable to enforcing Kropp’s claims for breach of contract and tortious interference, the claims asserted against the defendants “arose” after the filing of the bankruptcy case. Kropp’s claims also just as clearly arose from the “operation of the business of the debtor”, in that in its continued path toward reorganization, Kropp seeks to retain those customers with whom it asserts the defendants have interfered. This is not an action in which Kropp asserts that a pre-petition breach of employment contracts by Dwyer, Brewer and Garelli – or tortious interference by Illini – caused damage to its business of which it only became cognizant post-petition. Rather, as is made

clear by its complaint, Kropp asserts that all of the alleged actions by the defendants occurred post-petition, and consequently impair the post-petition operation of its business in diminishing its ability to retain customers for the operation of that business. Throughout its assertions, Kropp continuously relies on the fact that the employment contracts which it alleges the individual defendants breached were signed pre-petition, and that somehow every action in relation to any breach of those contracts “relates back” to the pre-petition signing of those contracts. That concept simply won't fly.

The court determines that claims asserted in this adversary proceeding against all four defendants arose after the commencement of Kropp's Chapter 11 case, and that those claims arose from the operation of Kropp's business after the commencement of that case. Thus, 28 U.S.C. § 1409(d) applies.

The next issue is the determination of appropriate venue under 28 U.S.C. § 1391(a), given that venue is to be determined pursuant to 28 U.S.C. § 1409(d).

28 U.S.C. § 1391(a) states:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a)(3) is not at play in this proceeding. Jurisdiction would clearly be appropriate in the United States District Court for the Northern District of Illinois, or derivatively in the United States Bankruptcy Court for the Northern District of Illinois, pursuant to 28 U.S.C. § 1391(a)(1). The parties' dispute revolves around § 1391(a)(2).

28 U.S.C. § 1391(a)(2) causes venue to be proper in a judicial district which meets one

of the two following criteria:

1. A district in which a substantial part of the events or omissions giving rise to the claim occurred; or
2. A judicial district in which a substantial part of the property that is the subject of the action is situated.

In its complaint, Kropp has stated: "Because the acts complained of all took place in Illinois and because all the Defendants are citizens of Illinois, Illinois law applies to this controversy" [complaint, ¶13]. Thus, for the purposes of the first alternative under § 1391(a)(2), all "event or omissions" occurred in Illinois, and the action must be commenced in Illinois under that provision.

However, Kropp argues that the second alternative of § 1391(a) controls, i.e., that "a substantial part of property that is subject of the action is situated" in Indiana. In advancing this contention, Kropp focuses on the "property that is the subject of the action" as being the contracts which it asserts Dwyer, Brewer and Garelli breached by allegedly approaching Kropp's customers within the scope of the restrictive covenants contained in those agreements. First, this contention has nothing to do with Illini. There are no contracts between Illini and Kropp, and the complaint asserted against Illini is strictly based upon the tort of interference with business relationship or prospective business relationship, however that tort may be defined in Illinois. Thus, the existence of the contracts with Dwyer, Brewer and Garelli has little to do with Kropp's action against Illini. Any action allegedly undertaken by Illini in inducing the individual defendants to breach their contracts occurred solely in Illinois with respect to Kropp's Illinois customer base, and it is that customer base and the interference with that customer base that forms the basis for Kropp's assertions against Illini. The "property" implicated with respect to Illini is solely in Illinois. Thus, any action against Illini asserted by Kropp can only be pursued in Illinois pursuant to 28 U.S.C. § 1391(a)(2).

In advancing its arguments, Kropp asserts principally that the “property that is the subject of the action” with respect to the three individual defendants is the employment contracts. In doing so, Kropp either expressly or implicitly refers to the “property” interests protected by those contracts with reference to paragraph 25 of its complaint, which states:

25. The Restrictive Covenants are reasonably drafted to protect Kropp’s legitimate business interests in its near-permanent customer relationships, and in its confidential information, including, but not limited to, customer lists by revenue ranking, customer histories and the identities of decision makers. in computer based files thru RentalMan and Act software minimum pricing sheets belonging to Kropp, which show the lowest price (special pricing) in which Kropp will lease or sell equipment for the entire customer base for 3 states.

A reading of Kropp's complaint and the record as a whole leads the court to conclude that the “property” which Kropp seeks to protect is primarily its customer base in Illinois. The reference to “trade secrets” in the complaint is not a reference to some product or process or service which Kropp has singularly developed, e.g., a breakthrough drug for a cure for cancer. Rather, these “secrets” all relate to information as to the manner in which Kropp approaches its customer base, how it relates to its customer base, and how it prices its product – rental of equipment – to its customer base. The specific averments of breach of contract in relation to the three individual defendants – stated in paragraphs 46 (re Dwyer), 57 (re Brewer), and 68 (re Garelli) – all specifically address solicitation of Kropp's Illinois customers. The territorial restrictions in the employment contracts are nearly exclusively targeted to Illinois, and are exclusively outside Indiana as to Brewer and Garelli.

In a technical sense, the employment contracts constitute property of the debtor’s bankruptcy estate. However, Kropp confuses the concept of “property of the estate” in advancing its interests under the employment contracts with the concept of where “property that is the subject of the action is situated”. The property interests of Kropp subject to this action are its customers and its continued business relationships with those customers. All of those

customers are in Illinois, and its business relationships with those customers arise from locations in Illinois. The fact that the employment contracts with the individual three defendants may be retained at Kropp's corporate headquarters in Indiana has nothing whatever to do with the locus of the "property that is the subject of the action". Kropp's property for the purposes of 28 U.S.C. § 1391(a)(2) is its customer relationships with customers in Illinois, and it is in Illinois in which that property interest "is situated". As stated in *GCG Austin, Ltd. v. City of Springboro, Ohio, et al.*, 284 F. Supp.2d 927, 929 (S.D.Ohio 2003):

"[T]he purpose of Section 1391 is to ensure that the plaintiff does not select a venue that is unfair or inconvenient to the defendant."
United Liberty Life Ins. Co. v. Pinnacle West Capital Corp., 149 F.R.D. 558, 562 (S.D.Ohio 1993).

Kropp's assertions are against Illinois residents, with respect to actions undertaken exclusively in Illinois, concerning property interests of Kropp in Illinois. Venue under § 1391(a)(2) can only be in Illinois.

With respect to venue under 28 U.S.C. § 1391(a)(2), the court determines that the property which is the subject of Kropp's actions – its continuing relationship with Illinois customers – is situated in Illinois, and that venue is not appropriate in the Northern District of Indiana.

C. Transfer or Dismissal

The court has determined that venue of this adversary proceeding in the United States Bankruptcy Court/United States District Court for the Northern District of Indiana is not proper. This determination brings into play 28 U.S.C. § 1406(a), which provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

The court has determined that adversary proceeding number 10-2035 was filed in the wrong federal district. The defendants do not seriously contest that the action could have been filed in

the United States District Court for the Northern District of Illinois, but rather argue dismissal as that course of conduct apparently being perceived to be in their best interests. The “interest of justice” under 28 U.S.C. § 1406(a) is an extremely nebulous concept, having little to recommend it as a guide to trial courts seeking to apply it. However, Kropp has filed a complaint in this adversary proceeding which would avoid a motion to dismiss under Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6). The only issue before the court is the proper court in which that complaint should be addressed. If the allegations of the complaint prove true, Kropp may well establish the right to an injunction and a right to damages, depending upon the extent to which its customer base has been affected by alleged actions by the defendants. Consequently, the court determines that dismissal of the case is not appropriate, and that the “interest of justice” requires transfer of the case to a federal court in Illinois.⁵

The court determines that adversary proceeding number 10-2035 should be transferred

⁵ In the court’s view, certain cases which review the issue of transfer of venue under 28 U.S.C. § 1406(a) confuse the standards applicable to that issue with standards applicable to transfer of venue under 28 U.S.C. § 1412; see, e.g., *In re Langston*, 291 B.R. 872 (Bankr. N.D.Ala. 2003). 28 U.S.C. § 1406(a) is based upon the premise that a case has in fact been filed in the wrong division or district, while 28 U.S.C. § 1412 presupposes that the case is filed in the appropriate district or division. The only two choices under § 1406(a) are dismissal or transfer, and it is a precondition for the application of that statute that the case cannot remain in the division or district in which it was filed. Thus, the case can’t be filed at all, or it can be transferred to another district or division in which proper venue lies. “Convenience of parties” isn’t much of a consideration in this context, and if it were, transferring this case to a federal court in Illinois is more convenient for the defendants than would be true if the case remained in the Northern District of Indiana, which it cannot. Thus, to the court, the “interest of justice” under § 1406(a) is a balance between whether or not the case should be dismissed, or whether it should be transferred so that it can proceed. The court has difficulty conceiving of a case which would survive a motion to dismiss pursuant to Fed.R.Bankr.P. 7012(b)/Fed.R.Bankr.P. 12(b)(6), as does this case at this stage of the proceedings, in which it would be in the interest of justice to dismiss that case, rather than to simply transfer the case to the venue in which federal law states the case should have originally been commenced. In short, the option of dismissal under 28 U.S.C. § 1406(a) is applicable to cases which don’t state a legally cognizable claim – i.e., so what’s the point of transferring a bogus case to another District to have that District declare the case to be bogus.

to the United States Bankruptcy Court for the Northern District of Illinois.⁶

The court determines that adversary proceeding number 10-2035, although improperly venued in the Northern District of Indiana, should not be dismissed, but rather should be transferred to the United States Bankruptcy Court for the Northern District of Illinois.

D. Determination

Based upon the findings of fact and conclusions of law stated above, the court determines the following pursuant to 28 U.S.C. § 157(c)(1)/N.D.Ind.L.R. 200.1(a)(3)(B):

A. Adversary proceeding number 10-2035 is not a core proceeding under 28 U.S.C. § 157(b)(2).

B. Venue of adversary proceeding number 10-2035 is to be determined pursuant to 28 U.S.C. § 1409(d).

C. Pursuant to 28 U.S.C. § 1409(d), venue of the adversary proceeding is to be

⁶ U.S. Dist. Ct. Rules N.D.Ill., LR 40.3.1(a) provides that this case would be referred to the United States Bankruptcy Court for the Northern District of Illinois. As stated in *In re Hillsborough Holdings Corporation*, 146 B.R. 1008, 1010 (Bankr. M.D.Fla. 1992):

As a preliminary matter, it should be noted that theoretically, the literal reading of the statute, *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) mandates that only a District Court may transfer cases or proceedings pursuant 28 U.S.C. § 1412 and, if the Motion is granted, it is technically transferred to a District Court and not to the Bankruptcy Court of the transferee District. Notwithstanding, both parties agree and there is no contention to the contrary, that it is proper for this Court to rule on the Motion and this Court may transfer this Adversary Proceeding pursuant to 28 U.S.C. § 1412 directly to another bankruptcy court bypassing the district court, provided, of course, that bankruptcy court to whom it is transferred also operates under the general reference issued by the district court of that district pursuant to 28 U.S.C. § 157(a). This will avoid the tortuous and totally pointless route and expense of first, to file a Motion to Withdraw Reference; second, to file a Motion to Transfer to the District Court; third, if the district court grants same, to order the transfer to the proper district court; and fourth, that the proper district may enter an Order of Special Reference and refer the matter to the bankruptcy court if so deemed to be advised or retain the transferred proceeding, a highly unlikely event. In this connection, it should be noted that all 94 districts in the country have standing orders of general reference entered pursuant to 28 U.S.C. § 157(a).

Thus, the case should be transferred to the United States Bankruptcy Court for the Northern District of Illinois.

determined pursuant to 28 U.S.C. § 1391(a).

D. Pursuant to 28 U.S.C. § 1391(a)(2), venue of adversary proceeding number 10-2035 is not proper in the United States courts for the Northern District of Indiana, but is proper in the United States federal courts for the Northern District of Illinois.

E. Pursuant to 28 U.S.C. § 1406(a), adversary proceeding number 10-2035 should not be dismissed, but rather should be transferred to the United States Bankruptcy Court for the Northern District of Illinois.

Dated at Hammond, Indiana on September 30, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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